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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY GOODRUM,

Defendant and Appellant.

D041921

(Super. Ct. No. SCD170068)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Tony Goodrum appeals his conviction of voluntary manslaughter with the personal use of a firearm (Pen. Code,¹ §§ 192, subd. (a), 12022.5, subd. (a)(1)).² He contends it must be reversed because the court refused to instruct on antecedent threats by the victim, refused to instruct on the presumption that a person acts in self-defense

¹ All statutory references are to the Penal Code unless otherwise specified.

against an intruder to his or her residence (CALJIC No. 5.42), and erred in admitting his prior 1981 conviction for attempted robbery. We affirm.

FACTS

Goodrum lived with his girlfriend Ieisa Wilson, her two children, and another couple in a house on Brookhaven Road. Goodrum and the victim, Dwayne Stamps, were friends. About a year earlier Stamps had rented a room in the Brookhaven house for a few months. In the past, Goodrum and Stamps had argued, even to the point of pushing or shoving each other, but they had never had a fist fight and Stamps had never made any threats to kill Goodrum or anyone else. Goodrum and Stamps had not seen each other for several months. Some animosity had developed between them because Stamps had borrowed and not returned Wilson's car (Wilson and Goodrum viewed it as a theft of Wilson's car).

On September 24, 2002, Stamps had been terminated from a drug rehabilitation program, his girlfriend Lorraine Murray had complained about not being happy with the relationship, and he had backed her vehicle into a pole or tree, damaging it. After stopping at a bar, Stamps and Murray drove to the Brookhaven residence, arriving about 9:00 p.m. At the time of his death, about 30 minutes later, Stamps had a blood alcohol level of .17 percent.

When Stamps and Murray arrived, the garage door to the Brookhaven residence was propped open six to seven inches with a pipe. The lights were on in the garage,

2 Goodrum also pleaded guilty to possession of a firearm by a felon (§ 12021, subd.

which was often used by the residents of the house as an additional living space.

Goodrum was inside the garage with a woman playing dominoes. Goodrum, the woman, and her friend had used methamphetamine that day "for a few hours at least."

When Stamps knocked loudly on the garage door, Goodrum responded by opening the door. Stamps walked in and said he was looking for Jason Cruz who had his earring and other belongings. He was rude to the woman, suggesting in a lewd manner that he knew her and told her that if she saw Cruz to tell him that he was going to kill him.

Stamps entered the house, took Wilson into the bedroom and accused her of saying "mean things" about him. According to Wilson, Stamps threatened to kill her. When Goodrum entered the bedroom, Stamps accused Goodrum of having his diamond earring. Goodrum said the earring was in a duffel bag, which he took out of a closet, carried out to the garage, and set down in front of Murray's vehicle. Stamps and Goodrum argued in the garage and exchanged blows both in the garage and in front of Murray's vehicle. According to Goodrum, Stamps said he was going to get a gun and shoot everyone in the house.

Stamps went to Murray's vehicle and pulled out a roofing hammer, which was described as looking like a tomahawk, hatchet, or axe. According to Goodrum, Stamps threatened, "I'm gonna fuck you up. I'm gonna fuck you up." Goodrum pulled out a knife and picked up a trash can with his other hand. The men continued arguing but did not raise their weapons. Goodrum told Stamps to leave.

(a)(1)) but does not raise any issues as to that conviction.

There were other people in the garage area, including the woman with whom Goodrum had been playing dominoes, Murray, and Goodrum's friend Howard Herring. According to some of the witnesses, things calmed down; both men put down their weapons, they hugged, Stamps apologized, and said he loved Goodrum as a brother. According to Goodrum, things did not calm down. Stamps made a comment that he was "gonna get [his] strap and shoot everybody in the house." Goodrum responded he was going into the house and when he came back he was "gonna be shootin' sparks." Goodrum retrieved a rifle from between the mattress and box springs of the bed in the master bedroom. He cocked the rifle in the bedroom.

When Goodrum entered the garage with the rifle, Stamps stood near the rear of the driver's side of a car parked in the garage. When Stamps became aware of the gun, he said something like, "Go ahead and shoot me." According to several witnesses, including neighbors, Stamps was not holding anything in his hands. A neighbor across the street saw Goodrum advance toward Stamps. Herring and Goodrum, as well as another neighbor, testified Stamps started walking toward Goodrum. Goodrum fired twice at Stamps, hitting him once in the head and once in the chest.

Herring testified that after the first shot, Stamps turned, grabbed his stomach and said something like, "I can't believe you shot me." Herring saw blood in the area of Stamps's heart. As Stamps turned, Goodrum fired a second shot and Stamps collapsed to the ground. According to Murray, the first shot hit Stamps in the face and he staggered. The second one hit him in the heart, he fell to the ground, and Goodrum was preparing to fire again when Murray shouted at him to stop.

According to Goodrum, when he entered the garage, Stamps commented in a sarcastic or mocking tone of voice, "Oh, he's got a gun. What are you gonna do with a gun?" Goodrum thought Stamps was hiding something behind his back, possibly a gun. Stamps kept advancing despite Goodrum's warning him that he was going to shoot if Stamps came any closer and that he was "a damn good aim." Goodrum fired when Stamps started moving a pipe from behind his legs. After the first shot, Stamps continued to swing the pipe up, so Goodrum fired again. A pipe was later found near Stamps's body.

Stamps died as a result of the gunshot wounds, either of which was potentially fatal. The head wound likely would have caused immediate unconsciousness and it would have been unlikely Stamps would have been able to speak or move after the wound was inflicted. The barrel of the rifle was two feet or further from the head wound when it was inflicted. In contrast, the barrel of the rifle was touching or nearly touching Stamps when the chest wound was inflicted. It is possible that if the chest wound were inflicted first that Stamps might have remained standing and able to speak.

Goodrum presented evidence that after the shooting Murray had told some people that earlier in the evening Stamps stated he thought he was going to die that night and purposely drove into ongoing traffic and hit a light pole, in an effort to kill them both. She said Stamps was upset about being terminated from the drug rehabilitation program and was afraid if he "got a dirty test" he would be sent back to jail. He told her he was not going back to jail; they would have to kill him first. She also said Stamps had grabbed a pipe and had advanced toward Goodrum. Murray denied making any of these statements.

DISCUSSION

I

Denial of Instruction on Previous Threats

Goodrum contends his voluntary manslaughter conviction must be reversed because the trial court committed prejudicial error when it refused to give an instruction that previous threats by the victim may be considered in deciding whether a defendant acted in self-defense.

The record we have on appeal does not contain a copy of the requested instructions. It appears Goodrum was requesting the jury be told that a defendant is justified in acting more quickly or taking stronger self-defense measures when the deceased had threatened or harmed the defendant in the past. The court indicated it was not "inclined to include the instruction," noted the instruction on justifiable homicide in self-defense (CALJIC No. 5.12) was adequate and stated it was proper for defense counsel to argue the point.

The trial court has a duty to instruct the jury on general principles of law which are closely and openly connected with the evidence and which are necessary to the jury's understanding of the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) The trial court must instruct on a particular defense and its relevance to the charged offense if it appears the defendant is relying on the defense or if there is substantial evidence to support the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; *People v. Jackson* (1989) 49 Cal.3d 1170, 1199.) Upon proper request, a defendant has a right to an instruction

pinpointing the theory of defense, including an instruction on the effect of antecedent threats or assaults by the victim on the reasonableness of defendant's conduct when the defendant is asserting self-defense. (*People v. Randolph* (1993) 20 Cal.App.4th 1836, 1841; *People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1663-1664.)

"A trial court has no duty to instruct the jury on a defense—even at the defendant's request—unless the defense is supported by substantial evidence." (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) The appellate court will not reverse for an instructional error unless there is "a reasonable probability, not a mere theoretical possibility, that the instructional error affected the outcome of the trial." (*People v. Blakeley* (2000) 23 Cal.4th 82, 94, italics omitted.)

Here, Goodrum testified that previously he and Stamps had engaged in verbal arguments involving, at most, some pushing or shoving and had never had a fist fight with Stamps nor had Stamps threatened to kill anyone before. Further, Goodrum testified that generally he was not afraid of Stamps. During his police interview, Goodrum denied having been afraid of Stamps in the past. In other words, Goodrum's testimony and statements indicated Stamps had not threatened or assaulted him in the past and, indeed, he was not afraid of him.

To support his claims the antecedent threats instruction should have been given, Goodrum points to: (1) his awareness Stamps had a previous conviction for a violent

felony;³ (2) Herring's testimony that when Stamps first entered the residence, Stamps acted "like a wild man," grabbed a lamp and acted as if he were going to hit Herring;⁴ (3) Stamps's threats that evening to kill Jason Cruz, Wilson, and Goodrum; (4) Stamps's engaging in a fist fight with Goodrum; (5) Stamps's assault of Goodrum with a roofing hammer while saying, "I'm gonna fuck you up. I'm gonna fuck you up"; and (6) other evidence of Stamps's hostility and anger to others prior to the shooting.

The record shows that, other than Stamps's prior conviction, these violent statements and conduct occurred over a relatively brief period of time, just prior to the shooting, that is, between "about" 9:00 p.m. when Stamps arrived at the Brookhaven residence and 9:37 p.m. when a neighbor reported the shooting. Aside from Stamps's prior conviction, these acts and statements did not occur on a prior occasion—the situation addressed by the antecedent threats instruction—but were part of the series of acts and statements that led up to the shooting. Thus, they did not warrant giving the instruction.

Moreover, even if we were to conclude the court erred, we would not reverse. There is no reasonable possibility the jury here did not consider Stamps's violent statements and conduct prior to the shooting. The evidence was thoroughly presented to

³ The parties stipulated Stamps had been convicted of assault with a deadly weapon in 1998.

⁴ Herring testified after Stamps acted as if he were going to strike him, they had a friendly conversation and hugged. He testified there was no animosity between them and he believed Stamps "was just playing."

the jury and was the subject of closing argument. The jury was fully instructed on self-defense. (See, e.g., CALJIC No. 5.12, "Justifiable Homicide in Self-Defense.") The jury's verdict indicates the jury took Stamps's conduct into account. The jury, instead of finding Goodrum guilty of murder, a finding that would have been supported by substantial evidence, determined Goodrum had an honest belief in the need to defend himself and returned a verdict of voluntary manslaughter.

II

CALJIC No. 5.42 - Presumption of Self-Defense

Goodrum contends the trial court erred in refusing to give his requested instruction on the use of force within a residence.

The instruction, derived from CALJIC No. 5.42 and section 198.5, stated:

"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully forcibly entered the residence and the person using force knew or had reason to believe that a unlawful and forcible entry had occurred.

"As used in this section, great bodily injury means a significant or substantial physical injury."

For the presumption of self-defense in section 198.5 to apply, there must be an unlawful and forcible entry into the residence. (See *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494.)

Here there was no evidence of a forcible entry. The undisputed evidence shows Goodrum, in response to Stamps's knocking on the garage door, opened the door and allowed Stamps to enter. Since the evidence does not support a finding of a forcible entry, we need not address Goodrum's claim the court erred in concluding there was no substantial evidence to support a finding Stamps entered with an intent to steal Wilson's car or to assault Goodrum with the roofing hammer.⁵

We find no error by the court in refusing to instruct the jury with Goodrum's proposed "Use of Force Within Residence" instruction.

III

Impeachment with 1981 Attempted Armed Robbery Conviction

Goodrum contends the court abused its discretion in admitting his 1981 attempted armed robbery conviction over his Evidence Code section 352 objection. He contends the conviction had minimal probative value because it was remote in time.

The trial court initially ruled Goodrum's 1981 conviction could not be used for impeachment because it was too remote but later admitted the prior conviction under Evidence Code section 1103, sub division (b). During cross-examination, the prosecutor

⁵ Even if we were to reach these issues, we would agree with the trial court. Goodrum's theory Stamps intended to steal Wilson's car is based on an attempt to link Stamps's anger at Wilson with other evidence of Stamps's agitation about keys to support a conclusion Stamps was seeking the keys to Wilson's car in order to steal it. The evidence, however, indicated Stamps was agitated about losing the keys to Murray's vehicle, keys that were not located until the following day. As to Goodrum's theory that Stamps entered with an intent to commit an assault with the roofing hammer, we note the evidence shows Stamps retrieved the hammer only after he and Goodrum had argued.

asked Goodrum if he had ever used a gun before this case other than on hunting trips. When Goodrum answered, "Yes," the prosecutor elicited that Goodrum had used a gun in an attempted robbery of a former employer whom he believed owed him money. On redirect, Goodrum explained the conviction had occurred in 1981 and he had pleaded guilty.

Evidence Code section 1103, subdivision (b) allows introduction of evidence of a defendant's violent acts and reputation for violence if a defendant presents evidence as to the bad acts or reputation of the victim of a crime. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1083.) Nonetheless, pursuant to Evidence Code section 352, the court may exercise its discretion to exclude such evidence if its probative value is outweighed by a danger of undue prejudice. (Evid. Code, § 352.) Among the factors tending to undercut a finding that a defendant's prior violent conviction is probative is that the conviction occurred in the remote past and the defendant subsequently led a blameless life. (See *People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

"[Evidence Code] section 352 uses the word 'prejudice' . . . in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on other grounds as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) " '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code]

section 352, "prejudicial" is not synonymous with "damaging." ' ' ' ' (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

" 'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.' " (*People v. Green, supra*, 34 Cal.App.4th 165, 182-183.)

Goodrum acknowledges Evidence Code section 1103, subdivision (b) authorized admission of his prior conviction, but argues the court should have exercised its discretion to exclude the conviction because it occurred 21 years ago.⁶ While we agree the conviction was remote in time, it was not necessarily so remote in time as to have no probative value, particularly since it involved the use of a gun. More importantly, even if we were to conclude the court erred in admitting the conviction, we would not reverse.

The examination on the prior conviction was very brief. It was not mentioned during closing argument. The prior conviction was much less inflammatory than the charged offense. The prior conviction involved only an attempted crime while Goodrum was young. In contrast, the charged offense was murder using a firearm. Further, the charged offense was committed while small children were present.

⁶ The Attorney General argues the 1981 conviction was not too remote because Goodrum had not thereafter led a crime free life. While it is true that the probation report shows Goodrum was convicted of Vehicle Code violations and contempt of court in 1990, 1993, and 2000 and that his probation in the 1990 offense was twice revoked, the

The focus of the trial and closing argument was on whether Goodrum was justified in killing Stamps. The jury evidently gave careful consideration to the defense evidence; they rejected the prosecution's theory Goodrum had committed either first or second degree murder and instead found Goodrum was guilty only of voluntary manslaughter. There is ample evidence in the record to support the jury's conviction of voluntary manslaughter.

Under these circumstances, there is no reasonable possibility the jury's verdict of voluntary manslaughter was the result of passion or prejudice deriving from the 1981 conviction rather than based on the evidence presented at trial.

IV

Admission of Prior Conviction and Due Process

Goodrum contends the admission of his 1981 conviction violated his federal due process rights and deprived him of a fair trial because it constituted improper "other acts" evidence. He explains "there were no permissible inferences that the jury could draw from the 1981 attempted robbery conviction, other than the [improper inference] that if [he] committed a violent felony before, he was guilty in this case." He contends it was highly probable the prior conviction "had a substantial and injurious effect or influence in determining the jury's verdict." We disagree. As we explained in part III, *ante*, there is no reasonable probability the admission of the 1981 conviction adversely affected the verdict.

record on appeal does not reflect that the prosecutor presented this evidence to the court

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.

at the time it made its ruling.